In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 451

A. RICHARD PERKINS, Administrator of the Estate of Sue Garrett Perkins, Deceased,

Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of Isabel Hadcock, Deceased, and as Trustee under the Last Will and Testament of Isabel Hadcock, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

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In the Supreme Court
OF THE
United States

October Term, 1961

No.

A. Ronald Perkins, Administrator of the Estate of Sue Garrett Perkins, Deceased,
Petitioner

vs.

Waukesha National Bank, Individually, and as Trustee, and Edward G. Bach, Individually, as Executor of the Estate of Isabel Hadcock, Deceased, and as Trustee under the Last Will and Testament of Isabel Hadcock, Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Seventh Circuit

Petitioner A. Ronald Perkins prays that the writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered on its

docket No. 13,210 on May 26, 1961 affirming a decision of the United States District Court for the Eastern District of Wisconsin.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court filed September 7, 1960 is unreported. That opinion and the court's findings of fact and conclusions of law are reproduced in the record (App. 28-48).[1] The opinion of the Court of Appeals is reported at 290 F. 2d 912 and is reproduced in Appendix A appended to this petition.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1961; a timely petition for rehearing filed on June 10, 1961 was denied on June 29, 1961. Jurisdiction of this Court is invoked under U. S. Code, Title 28, Sec. 1254(1).

STATUTES INVOLVED

United States Code, Title 28, Section 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

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[1]References (App. .....) in this petition refer to pages of the Appendix to Appellants' Brief included as a part of the record.

[2]References to the opinion are designated (App. A .....).

The Constitution of Wisconsin (adopted March 13, 1848), Article 14:

> "Section 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

The Wisconsin statutes, Chapter 363 Laws of 1935, amended Section 320.01:

> "Executors, administrators, guardians, and trustees may invest the funds of their trusts in accordance with the provisions pertaining to investments contained in the instrument under which they are acting, or in the absence of any such provisions, then in securities of the following classes:
>
> (1) In bonds, notes or other evidences of indebtedness of the United States • • •
>
> • • • • • • •
>
> (11) Obligations secured, whether alone or in combination with other obligations on a parity therewith, by real estate mortgages • • • which • • • are a first lien on improved real property situated in this state or adjoining states, the amount of which obligations do not exceed 50 per cent of the fair market value of the property covered thereby.
>
> (12) In promissory notes amply secured by pledge of any of the bonds, real estate mortgages or securities in which investment is hereinbefore authorized."

and Section 320.02:

> "The proportion of any one trust fund that may be invested by • • • trustee in notes • • • the value of which is dependent upon the same persons • • • shall be subject to limitations as follows:
>
> • • • • • • •

(3) When it exceeds twenty thousand but does not exceed fifty thousand dollars, thirty per cent thereof;"

QUESTIONS PRESENTED

1. Was it proper for the Courts below to deprive the income beneficiaries of an inter vivos trust of their equitable election to disavow an exchange of proper trust assets for an improper reinvestment and to trace those proper trust assets—merely because the improper reinvestment did return an income in excess of that earned by "legal" trust investments in which a reinvestment could have been made (but was not made)?

2. Was it proper for the Courts below to deprive the income beneficiaries of an inter vivos trust of their election to disavow an exchange of trust assets made by a trustee acting at the time in a dual capacity (a) as trustee for the income beneficiaries and (b) as financial agent for the transferee of the trust assets who profited from the exchange—merely because the trustee acted in good faith in effecting the exchange and did not personally make a profit?

STATEMENT OF THE CASE

This is an action for breach of trust. Petitioner, representing the income beneficiaries of an inter vivos trust, seeks the traditional remedy of tracing trust assets which have been wrongfully diverted from the trust into the hands of a transferee who does not claim to be a bona fide purchaser for value without notice. Petitioner seeks to recover from the participants in the violation of trust,

as well as from the transferee, nothing more than the return of trust assets and the profits which any of the participants made as a consequence of the breach of trust. No damages of any kind are asked and none are asserted as such. Both lower courts refused to grant this traditional remedy for the novel reason that no damages to the income beneficiaries were shown (App. 47-8; App. A xii).

The Court of Appeals affirmed a judgment of the District Court, which dismissed the complaint in this action brought against respondent Waukesha National Bank, as trustee, and respondent Bach, as the transferee of the diverted trust assets. Petitioner is administrator of the estate of the surviving income beneficiary.

Petitioner claims that respondent trustee in violation of its trust exchanged proper high income producing trust assets for an improper reinvestment, with which it set aside the particular trust fund here involved. As a consequence, petitioner asserts a right of election to disaffirm the improper reinvestment and to compel restoration of the exchanged assets and their income to the trust. Petitioner elected to trace particular assets diverted into the hands of respondent Bach, who is a gratuitous transferee of the assets with notice of the trust. The District Court denied petitioner's right of election (App. 47-8) and the Court of Appeals did so also, only because "there is no showing of damage" to the income beneficiaries (App. A xii).

Alfred W. Perkins and Sue Garrett Perkins, the now deceased life income beneficiaries of a $50,000 trust fund to be set aside for their benefit, brought this action in

1952. Jurisdiction of the District Court is based on diversity of citizenship. The two Perkins charged breach of trust and sought an accounting for misappropriated trust assets.

Samper A. Perkins, the settlor, created the trust in suit by transfer of a substantial portfolio of assets to respondent trustee, Waukesha National Bank, to be administered in Wisconsin under a trust agreement executed in 1932 (App. A ii; App. 59-66). The trust agreement provided that within five years after the settlor's death a $50,000 trust fund was to be set aside from the assets of the trust estate for the benefit of the life income beneficiaries, Alfred W. Perkins and his wife, or the survivor. The income from this fund was to be paid to them for their respective lives, following which the principal of the fund was to be distributed to the remainderman, Mrs. Isabel Hadcock (App. 59-66). The settlor died on August 15, 1932 (App. A iii).

The Court of Appeals determined that the trust estate transferred to respondent trustee included properties which did not qualify as "legal" trust investments under the statutes of Wisconsin (App. A ii; App. 66-7). However, the trust agreement authorized the trustee to retain any such "non-legal" investments which the settlor himself had placed in trust (App. A ii; App. 60). In this regard, the Wisconsin Supreme Court in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331 defined certain duties of the trustee under the trust agreement and held that, although the trustee could retain "non-legal" investments placed in the trust by the settlor, any discretionary reinvestments of trust funds

must comply with the limitations of the Wisconsin statutes governing "legal" trust investments. The Court of Appeals was bound by the decision that, in setting aside the $50,000 fund here involved, respondent trustee was limited to two investment choices—assets transferred to the trust by the settlor or "legal" trust investments authorized by Wisconsin statute (App. A x).

Petitioner charged that in setting aside the $50,000 fund, respondent trustee violated its trust by selecting neither of the two investment choices available to it for funding the trust. The trustee, instead, exchanged assets it then held in trust and with which the $50,000 fund could have been created, for a reinvestment in the personal note of Isabel Hadcock in the sum of $50,000 with interest payable at 5% per year (App. A vii). The District Court found that this personal note of Isabel Hadcock was not an authorized trust investment under the applicable Wisconsin statutes (App. 38).

The Court of Appeals did not decide the issue but held that petitioner was not entitled to the requested relief, in any event, because the 5% note yielded more than the average yield of "legal" trust investments (App. 55) and, hence, the life beneficiaries sustained no loss (App. A xii-xiii). The Court of Appeals reached this conclusion in spite of the fact that at the time of the exchange, and thereafter, the trust assets exchanged for the note earned substantially in excess of 5% per annum (App. 55).

So while Isabel Hadcock in effect was paying out 5% yield to the life income beneficiaries she was actually receiving in excess of that amount. This was accomplished

by the action of the trustee in accepting the personal note of Isabel Hadcock in lieu of setting aside assets of the trust. Petitioner regards this as illegal and improper. Here, the participants in the breach of trust obtained a profit for Isabel Hadcock—the difference between "substantially in excess of 5% income" and only 5%. But, both courts held that the income beneficiaries did not sustain a loss comparable to this profit. If that conduct can be upheld, respondents have found the perfect way to escape all legal consequences for a breach of trust—merely to execute a personal note at the statutory rate of interest.

Petitioner also charged that respondent trustee violated its trust by representing, as a financial agent, the remainderman of the trust, to whom the trust assets were transferred, at the same time that it endeavored to represent the conflicting interests of income beneficiaries in setting aside their $50,000 fund. The Court of Appeals concluded that this dual fiduciary relationship did in fact exist (App. A v-x). However, basing its decision upon a finding of the District Court that the trustee acted in "good faith" in making the foregoing exchange and that the improper reinvestment was to the "advantage" of the income beneficiaries, the Court of Appeals held that the beneficiaries were not entitled to a restoration of the exchanged trust assets (App. A x).

From June 25, 1940 until it resigned in 1955 respondent trustee held in trust the personal note of the remainderman and the note interest was paid to the income beneficiaries (App. 56-7). During this period the annual yield on "legal" trust investments complying

with the Wisconsin statutes did not exceed the 5% earned on the note (App. 55). However, it is stipulated that some of the trust assets exchanged for the note continued to earn in excess of 5%. Many were retained in an investment portfolio managed by respondent bank as financial agent for the remainderman (App. 87-89).

Prior to respondent's resignation, Mrs. Hadcock, the remainderman, died and at the time the complaint in this action was filed, her estate was in probate (App. 56). Respondent Edward G. Bach is the executor of that estate, a trustee under the will of Isabel Hadcock, and the gratuitous transferee with notice of certain assets and income which petitioner seeks to restore to the trust (App. A xv).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS, IN PERMITTING AND CONDONING THE IMPROPER TRUST INVESTMENT, HAS DECIDED AN IMPORTANT QUESTION OF WISCONSIN LAW IN A MANNER DIRECTLY CONFLICTING WITH A DECISION OF THE WISCONSIN SUPREME COURT CONSTRUING THE SAME TRUST.

Under the rule of *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and under U.S. Code, Title 28, Section 1652, the lower federal courts, having jurisdiction because of diversity of citizenship, were bound to follow Wisconsin law applicable to the administration of this trust. The Wisconsin Supreme Court has construed the very trust involved in this suit in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331. The Wisconsin Supreme Court there held that under the trust

agreement the trustee was authorized to hold any assets originally transferred to it by the settlor, whether or not those assets conformed to Wisconsin statutes governing trust investments. However, the court further held that the trustee was not empowered to make any discretionary reinvestments of trust assets beyond the limitations of the Wisconsin statutes (*First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331: summarized at App. A x-xi).

In direct violation of its investment powers, respondent trustee funded the $50,000 trust fund with the personal note of the remainderman in exchange for proper trust assets respondent then held in trust. This note was not an asset which the settlor had placed in trust. This note also did not comply with the limitations of the Wisconsin statutes, as found by the District Court (App. 38). This note clearly was an improper reinvestment of trust funds. Respondent did not follow either of the only two courses of investment available to it.

Although recognizing that respondent trustee may have exceeded its limited investment powers (App. A x-xii), the Court of Appeals, nonetheless, permitted and condoned the improper investment by denying to petitioner the relief here requested. This judicial approval of an improper trust investment under the trust agreement is in direct conflict with the decision of the Wisconsin Supreme Court in *First Wisconsin Trust Company v. Perkins* (1957) 275 Wis. 464, 82 N.W. 2d 331.

2. THE COURT OF APPEALS, IN DENYING TO PETITIONER AN OPTION TO DISAFFIRM THE IMPROPER TRUST INVESTMENT AND COMPEL RESTORATION OF TRUST ASSETS EXCHANGED FOR IT, HAS DECIDED AN IMPORTANT QUESTION OF WISCONSIN LAW IN A MANNER CONFLICTING WITH THE APPLICABLE DECISIONS OF THE WISCONSIN SUPREME COURT AND OF THIS COURT.

The decision of the Court of Appeals conflicts with Wisconsin law in two important additional respects.

First, the Wisconsin law does not require, as the Court of Appeals has held (App. A xii), that petitioner first must show damages before he is entitled to a restoration of trust assets exchanged in violation of trust.

While conceding that respondents may have violated the trust by exchanging proper trust assets for a reinvestment unauthorized by Wisconsin statute, the Court of Appeals, nonetheless, denied the wronged income beneficiaries their right to elect to disaffirm the exchange and compel a restoration to the trust of the exchanged trust assets. The *only* reason given by the Court of Appeals for that denial is that there was "no showing of damage" to the income beneficiaries (App. A xii).

This holding squarely conflicts with the law of Wisconsin as announced by this Court in *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333.[3] Where proper trust assets have been exchanged for improper ones, a beneficiary, as a remedy for the breach of trust, is entitled either to affirm the transaction and accept the improper investment or to

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[3]Under the Wisconsin constitution, adopted March 13, 1848, Article 14, Section 13, the rule of *Oliver* is a part of the law of Wisconsin.

disaffirm the exchange and require a restoration of the exchanged assets, insofar as they can be traced into the hands of the trustee or others who are not bona fide purchasers for value. The option is one which belongs exclusively to the beneficiary and neither the trustee nor anyone else can deprive him of it [*Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, 401]. At page 401 this Court stated the rule as follows:

> "* * * It is a clearly established principle in that [equity] jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the cestui que trust is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent re-purchase of the trust property, although in the latter case the cestui que trust may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. * * * The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested,) exclusively given to the cestui que trust, and is given to him for the wisest purposes and upon the soundest

> public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. • • •"

In *Oliver* the trustee misappropriated trust assets by exchanging them for other property. The misappropriated trust assets were later repurchased by the trustee and returned to the trust. Thus, the beneficiaries there were not damaged for they then had the same assets which were originally held in trust. This Court, nonetheless, held that the beneficiaries were entitled to elect to refuse the returned trust assets and to compel restoration of the other property, instead, to the trust as the trust investment.

In the instant case, in spite of respondent trustee's breach of trust and contrary to the rule of *Oliver*, the Court of Appeals refused to permit the life income beneficiaries to exercise their option of requiring a restoration of the exchanged assets. Instead, the Court of Appeals held that the life beneficiaries must accept the improper trust investment whether they want it or not, solely because the court found they had not been damaged. This is not the law of the *Oliver* case. Petitioner is not seeking damages and his claim has nothing to do with damages.

This Court has held that damages or the lack of damages have no relation to the option announced in *Oliver*. In *United States v. Dunn* (1925) 268 U.S. 121 at page 131 this Court stated:

> "Undoubtedly in an action at law for fraud or deceit, since the action sounds in damage, the plaintiff must prove damage to establish a right to recover.

> • • • But such is not the situation here presented. The grant of the lease by Thomas, the guardian, to Dunn and Gillam with a secret agreement that the guardian should be jointly interested in the lease with Dunn and Gillam, was a fraud upon the ward, rendering the whole transaction voidable at the option of the ward or those legally representing her. *It is not necessary in such a situation in order to establish the right to relief to show that the beneficiary was damaged by the fraudulent conduct of the trustee.* It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more. (Citations omitted; emphasis added)."

It is therefore settled that the option to affirm or disaffirm the present exchange does not depend upon damages, but is exclusively one for the benefit of the beneficiary and cannot be taken away. This is true even where the trustee itself, as found by the Court of Appeals (App. A xiii), has made no profit from the improper investment.[4]

In a consistent line of authority, set forth in chart form in Appendix B, the Wisconsin Supreme Court has adopted the rule of *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333 and has held that a beneficiary may require restoration of trust assets exchanged in violation of trust even though no damage to the beneficiary has been sustained [*Will of Gabel* (1954) 267 Wis. 208, 64 N.W. 2d 853; *Old Settlers Club v. Haun* (1944) 245 Wis. 213, 13 N.W. 2d 913; *Ludington v. Patton* (1901) 111 Wis. 208, 86 N.W. 571; *O'Dell and others v. Rogers and others* (1878) 44 Wis. 136; and *Cook v. Berlin Woolen Mills* (1877) 43 Wis. 433]. The

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[4]One trustee, Baum, in *Oliver* made no profit from his violations of trust.

election is entirely up to the beneficiary and is not dependent upon whether or not the trust estate has sustained a loss because the option arises solely upon the establishment of a violation of duty owed by the trustee. In *Will of Gabel* (1954) 267 Wis. 208, 64 N.W. 2d 853 the Wisconsin Supreme Court pointed this out at 267 Wis. 211.

> "* * * He [the trustee] is not relieved of the result of such conduct by the fact that he acted in good faith and without loss to the trust * * *"

Similarly, in *Ludington v. Patton* (1901) 111 Wis. 208, 86 N.W. 571 a trustee and heirs of a decedent induced decedent's widow, a life income beneficiary under a testamentary trust established by decedent, to relinquish her dower rights in his estate in exchange for a larger life income and cash sum than that provided in the testamentary trust. She later discovered that she would have received considerably more if she had taken, instead, her dower rights against the will. The Wisconsin Supreme Court held that, although the widow had received more generous sums than provided in the trust, as a remedy for the violations of trust committed by the trustee, the widow was entitled to a restoration of the estate assets which she could have obtained by electing to take her dower interest against the will.

This salutary rule of election has frequently been applied by this Court, and most recently in *Duplate Corp. v. Triplex Co.* (1936) 298 U.S. 448, 458; *Buffum v. Barcelour Co.* (1933) 289 U.S. 227, 236; and *United States v. Dunn* (1925) 268 U.S. 121, 132. The option is as vital today as it has been in the past. [See *General Petroleum Corpo-*

ration v. Doherty (9th Cir. 1941) 117 F. 2d 529, 539; and *Glen Falls Indemnity Co. v. Golden* (D. of D.C. 1957) 148 F. Supp. 41, 43]. The rule is a part of or has been adopted as the common law of almost every state in the Union.[5]

The option exclusively given to the beneficiary "is given to him for the wisest purposes and upon the soundest public policy" [*Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, 401]. The availability of the option is of great public interest and essential to enforce the absolute fidelity with which trustees must be charged in handling their beneficiary's affairs. As stated by the Wisconsin Supreme Court in *Estate of Allis* (1926) 191 Wis. 23, 209 N.W. 945, at 191 Wis. 29:

> "• • • The performance of the duties of a trustee require the exercise of a high degree of fidelity, vigilance, and ability. Especially is this true when the trustee is a company organized for the purpose of caring for trust estates, which holds itself out as possessing a special skill in the performance of the duties of a trustee, and which makes a charge for its services which adequately compensates it for a high degree of fidelity and ability in the administration of a trust estate.
>
> "Wisconsin early adopted the rule that trustees must exercise more than ordinary diligence and vigilance in the management of a trust estate. *Hutchinson v. Lord*, 1 Wis. 286, 309. Good faith alone in making an investment will not protect a trustee. *Simmons v. Oliver*, 74 Wis. 633, 636, 43 N.W. 561. A trustee must also exercise diligence, prudence, and absolute fidelity."

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[5]*Shepard's United States Citations* alone lists cases in over forty states in which the rule has been applied.

Only by permitting a wronged beneficiary at his own option to elect to affirm or disaffirm wrongful acts of a trustee, can this "absolute fidelity" be assured, particularly in an instance where no relief by way of damages can be shown.

The Court of Appeals in denying to petitioner this option to compel restoration of trust assets has cited Wisconsin damage cases (App. A xii). None states the Wisconsin law applicable to an exchange of proper trust assets for an improper one as presented in the case at bar. In each of the cited cases the beneficiary elected to pursue the remedy of damages only, for the violation of trust. In each case, as distinguished from the case at bar, the beneficiary did not or could not elect the alternate remedy available for restoration of transferred assets. Both *Guardianship of Farness* (1937) 225 Wis. 383, 273 N.W. 522 and *U. S. Fidelity & G. Co. v. Pullen* (1939) 230 Wis. 137, 283 N.W. 462 were actions for damages where the fiduciaries continued to hold improper trust investments which they were under an obligation to convert into "legal" investments. *Guardianship of Uggen* (1937) 224 Wis. 24, 271 N.W. 326 was an action for damages where the guardian invested a cash sum in improper securities. In none of those cases did the trustee originally hold proper investments which were later exchanged for improper ones as presented by the record in this suit. As a consequence, damages for the violations of trust was the only possible remedy there available. There were no proper assets held in trust which could have been restored.

The decision of the Court of Appeals in grafting a requirement for proof of damages upon the foregoing rule

of election is in direct conflict with the Wisconsin authorities enumerated in Appendix B. The decisions of the Wisconsin Supreme Court do not require a showing of damages as a condition precedent to granting the equitable relief here requested by petitioner.

Second, Wisconsin law provides that the mere occupancy by a trustee of a dual fiduciary capacity in any transfer of trust assets is a violation of trust, which may be justified only by proof that the beneficiaries of the trust received the "full equivalent" of everything with which they parted in the transfer. The Court of Appeals has erroneously applied that rule to the facts of this case in a manner conflicting with the decisions of the Wisconsin Supreme Court.

The conflict is crystal clear. The well-established rule of Wisconsin law is stated succinctly in *Ludington v. Patton* (1901), 111 Wis. 208, 86 N.W. 571 at 111 Wis. 239:

> "No rule is better established than that, if a trustee or a person standing in relations of trust and confidence to another deal with the cestui que trust or such other in respect to the subject of such trust, for his own benefit or that of others whom he represents, serving two persons at the same time, in form, when in contemplation of law he can serve but one loyally, *the transaction cannot be upheld if called in question by the cestui que trust unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence,* that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, *that the bargain was profitable to the beneficiary,* and that he was fully informed in regard to the value of the property and the nature of his interest in it. (cita-

> tions omitted) The policy of the law is to regard all transactions of a contract nature, between a trustee and his cestui que trust, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. *If such a transaction be permitted to stand it is upon condition that the trustee satisfies the court, fully and completely, that the cestui que trust received a full equivalent for that which he parted with,* and that the transaction was to his advantage rather than to his disadvantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. * * *'' (Emphasis added).

Thus, not only must a trustee establish that the transaction was to the ''advantage ' of the wronged beneficiary as noted by the Court of Appeals (App. A x), but also, the recreant trustee must also establish that the beneficiary ''received a full equivalent for that which he parted with * * *.'' What the life tenants ''parted with'' here was income from assets earning ''substantially in excess of 5% income'' (App. 55) and what they ''received'' was 5% annual income on $50,000. The latter by simple arithmetic was not the full equivalent of what the life beneficiaries ''parted with''. As a consequence, the exchange in suit did not meet any of the requirements of the rule announced in the *Ludington* case.

The Wisconsin Supreme Court has applied the same standard in *Shaw v. Crandon State Bank* (1911), 145 Wis. 639, 129 N.W. 794; *Hutson v. Jenson* (1901), 110 Wis. 26,

85 N.W. 689; *In re Filardo* (1936) 221 Wis. 589, 267 N.W. 312, and *Cook v. Berlin Woolen Mills* (1877), 43 Wis. 433.

Petitioner therefore submits that, not only is the decision of the Court of Appeals in direct conflict with the controlling Wisconsin law announced by this Court in *Oliver v. Piatt* (1845) 3 How. (44 U.S.) 333, but also, the decision in two respects is in conflict with the controlling Wisconsin law as announced by the Wisconsin Supreme Court.

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3. THE DECISION OF THE COURT OF APPEALS, IN DENYING TO PETITIONER THE RIGHT TO TRACE DIVERTED TRUST ASSETS, HAS SO FAR DEPARTED FROM THE FUNDAMENTAL RULES OF EQUITY JURISPRUDENCE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Counsel for petitioner is unable to locate any legal authority where a wronged beneficiary seeking it, has been denied his remedy to trace wrongfully diverted trust assets. And counsel for respondents, the District Court and the Court of Appeals have not cited any such authority. There is no precedent whatsoever for the decision of the Court of Appeals.

To the contrary, the courts have jealously protected the right of beneficiaries to trace trust assets diverted in violation of trust into the hands of the disloyal trustee or transferees who are not bona fide purchasers for value. The decision of the Court of Appeals is in conflict with the cases cited in the previous section of this petition establishing the right of the wronged beneficiary to compel the restoration to the trust of assets traced in specie. The decision also is in conflict with the following de-

cisions of this Court holding all profits and other property into which the diverted assets have been converted also may be traced even though there has been no loss to the trust.

Michoud v. Girod (1846) 4 How. (45 U.S.) 503;[6]
Magruder v. Drury (1914) 235 U.S. 106;
Jackson v. Smith (1921) 254 U.S. 586; and
United States v. Dunn (1925) 268 U.S. 121.

Petitioner respectfully submits that this Court should not permit any erosion of this important rule which has become a fundamental touchstone in equity jurisprudence.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for the writ of certiorari should be granted. This Court, in *West v. A. T. & T. Co.* (1940) 311 U.S. 223, said, page 237:

> "* * * State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all available data what the state law is and to apply it rather than to prescribe a different rule, * * *."

CARL HOPPE,
Attorney for Petitioner.

CLIFFORD C. KASDORF,
Of Counsel for Petitioner.

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[6]Under Constitution of Wisconsin, Article 14, sec. 13, adopted March 13, 1848, this is Wisconsin law also.

(Appendices A and B Follow)

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960---APRIL SESSION, 1961

No. 13,210

A. RONALD PERKINS, Administrator of the Estate of Sue Garrett Perkins, Deceased,
Plaintiff-Appellant,

v.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, EDWARD G. BACH, Individually, as Executor of the Estate of Isabel Hadcock, Deceased, and as Trustee under the Last Will and Testament of ISABEL HADCOCK, Deceased,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

May 26, 1961

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* This appeal was taken from dismissal of complaint for alleged breach of trust by a trus-

tee, the Waukesha National Bank. The appellant asserts a right to trace assets now in the hands of EDWARD G. BACH, the Executor and Trustee under the Will of Isabel Hadcock, deceased. The asserted right of such action arose out of administration of a trust set up by the settlor, Samper A. Perkins, by trust agreement made August 3, 1932, which transferred to the Waukesha Bank, as trustee, a portfolio of assets, including some properties which did not qualify as legal trust investments under the Wisconsin Statutes.

The Trust Agreement provided:

> 4. The assets and securities now comprised in said trust may be held by the trustee in its discretion, whether or not the same conformed to the rules prescribed by the laws of Wisconsin for the investment of trust funds, and the trustee in so continuing such assets in such trust fund pursuant hereto, shall be relieved from responsibility for depreciation or loss which may occur by reason of continuing to hold such trust fund, so long as the same is done in good faith; such assets and securities shall also be so held, so long as the donor shall survive, unless said trustee shall in the exercise of its sound discretion, deem it best to sell and dispose of such securities.

Not all of these assets were producing income. The Trust further provided:

> 16. The donor states that he is at present the owner of practically all of the capital stock of the Manufacturers Building Company and also of forty-nine per cent of the capital stock of Perkins Heights, Inc.; neither of which corporations at the present time have income producing properties and it will be necessary,

> so long as said corporations do not have income producing properties, for the trustee to advance from the trust estate such necessary funds as are required for the protection of said properties, for the betterment of the same or in the interests of said corporations, and said trustee shall [be] hereby authorized, empowered and directed to make such advances, the same to be advanced from the principal of such trust estate, or from the income thereof, as in the judgment and discretion of the trustee it seem best.

Upon the death of Samper A. Perkins, which occurred on August 15, 1932, a sum not to exceed $50 per month was to be paid to his brother Eugene "for a period of time not to exceed five years" from Samper Perkins' death, "if said Eugene Perkins so long lives;" and a sum not to exceed $200 per month was to be paid his brother A. W. Perkins, or Mrs. Perkins (the parents of appellant) "in case of his demise with his wife surviving him, such payments to continue for a period of not to exceed five years."

The Trust Agreement further provided:

> (d) At the expiration of said five year period, if not created before said time, a fund of Fifteen Thousand ($15,000) Dollars shall be created and set aside to create an income for the said Eugene Perkins, brother of said donor, should said Eugene Perkins continue to so long live and a fund of Fifty Thousand ($50,000) Dollars to be set aside and created for the use and benefit of said A. W. Perkins, and his said wife; the income from each of said respective funds to be paid to the said Eugene Perkins during his lifetime, when such trust fund shall cease and revert to the principal and be distributed as a portion of the residue herein

and the income from said Fifty Thousand ($50,000) Dollars to be paid to the said A. W. Perkins, or his wife, or the survivor of them, during their respective lives, when said fund shall also revert to and be distributed as a part of the residue of this trust estate: (e) In determining the values of the securities so being placed in such trust funds, the same shall be appraised and determined by the trustee as hereinabove provided.

(f) The net residue of any income from such trust estate shall be paid over to the sister of said donor, Mrs. Belle Hadcock, of Stevens Point, Wisconsin, until the expiration of said five year period, unless the said trust funds of Fifteen Thousand ($15,000) Dollars and Fifty Thousand ($50,000) Dollars, as set forth, shall be created and set aside prior to the expiration of said five year period, and when said funds are so set aside, if set aside prior to the expiration of said five year period, said trust shall cease as to the residue of principal and income of such trust fund, and the same be turned over to Mrs. Belle Hadcock, sister of said donor, or to her issue in case she does not leave a will distributing, dividing or disposing of the same;

(g) On the date of the termination of the trust relating to said funds of Fifteen Thousand ($15,000) Dollars and Fifty Thousand ($50,000) Dollars, said funds are to revert into the residue of this trust estate and be distributed as herein directed: To the sister of said donor, Mrs. Belle Hadcock, or to her issue, or as directed in her will. It is further directed that any accrued income upon any of said securities constituting a portion of the trust estate shall belong to the life beneficiaries up to the date of their demise.

Although broad discretion was given to the Trustee and provision was made as further indicated:

> 12. In the event that by the exercise of any discretion herein vested in the trustee, any loss or damage shall [accrue] to the trust estate, such loss or damage shall not be charged or imputed to the trustee, excepting only for bad faith shown in the exercise of its discretion.

Samper Perkins also directed that:

> 10. In making distributions of the principal of said trust estate, or setting aside any portion of such trust estate as hereinafter directed, the trustee may, in its discretion, appraise and distribute specifically any and all of the securities in which the trust estate shall be invested, or may sell or otherwise convert the same into money, or other securities, and may make such just and equitable distribution and division as in its discretion shall do justice between the parties; *this power, however, to be exercised only with the approval and consent of my sister, Mrs. Belle Hadcock, during her lifetime.* [Emphasis added.]

The $200 monthly payments to the A. W. Perkinses continued until June, 1940. There is no indication that the delay met with disapproval by the A. W. Perkinses. On June 25, 1940, the Trustee became the financial agent of Mrs. Hadcock.

Appellant takes the position that a breach of trust occurred when the Trustee Bank assumed a dual fiduciary capacity because of conflict between the interests of the A. W. Perkinses (who were to receive the income from the $50,000 trust fund to be set up for them) and the interests of Mrs. Hadcock, the remainderman. Appellant

argues that it was to the interest of the A. W. Perkinses that assets of the highest yield available (consistent with security) be chosen to fund their $50,000 trust, while it was to the advantage of the remainderman, Mrs. Hadcock, to retain any such assets for distribution to herself.

Under date of June 25, 1940, Mrs. Hadcock wrote to the Trustee Bank, as follows:

> Gentlemen:
>
> According to the terms of Mr. Perkins' trust agreement under which you are acting, which agreement was dated the 3rd day of August, 1932, two trusts were created, one of $15,000.00, in favor of Eugene Perkins, which was to run so long as he might live. As you are aware, Mr. Eugene Perkins is now dead, and that trust has now terminated.
>
> The other trust provided for the setting aside of $50,000.00, of securities, to be held as a trust fund during the lifetime of my brother, A. W. Perkins, and his wife, or the survivor of them, the income to be payable to them, with the payment of $200.00 per month having been provided for them for the first five years.
>
> I understand you have been continuing to pay the sum of $200.00 a month to A. W. Perkins and his wife, ever since my brother, S. A. Perkins' death.
>
> According to the terms of the trust instrument, all of the property was given to me at the expiration of the five year period, subject to the two trusts above named, one of which is terminated and with the property reverting to me or my heirs at the termination of each respective trust.
>
> It is now necessary to set aside funds or create sufficient money to provide for the $50,000.00 which you

are to hold in trust during the lifetime of A. W. Perkins and his wife, and it now seems advisable, in order to create said trust, for me to give my own individual note to you as trustee for the sum of $50,000.00, payable on demand, with the rate of interest at 5%, which will create sufficient so that you can very nearly continue the payment of the $200.00 a month to said A. W. Perkins and his wife.

I realize that it would be difficult, if not impossible, for you to invest $50,000.00 in any securities which would be legal investments under the laws of Wisconsin, to create that amount, altho it is my desire for you to be provided with sufficient funds at least for the time being, to continue to pay $200.00 a month to my said brother and his wife. Accordingly, for the purpose of creating a trust principal of $50,000.00, as specified in said trust agreement, I am, for value received, handing you herewith, my own personal note in the sum of $50,000.00 * * * due on demand, drawing 5% interest, payable in monthly installments, it being my intention hereby to furnish you with the security which will be legal for the investment of trust funds to be held by you under the terms of the trust agreement for the benefit of my said brother A. W. Perkins, and Garrett Perkins, his wife, or the survivor.

My said note will be secured by collateral, which is legal for the investment of trust funds, under the laws of Wisconsin.

Your receipt to me for these securities will be appreciated.

The Trustee Bank accepted the note as the investment with which to fund the $50,000 trust.

Appellant contends that the mere existence of the dual capacity constituted such breach of trust as to enable appellant to trace such of the assets as the Trustee might have chosen in place of Mrs. Hadcock's note. As an example, appellant reviews the history of some shares of Hein-Werner Motor Parts Corporation stock, available among those original assets of the trust which did not meet the Wisconsin statutory requirements for trust investment, but which the Trustee was empowered to retain. It is appellant's position that the value of this stock was not only evident on June 25, 1940, but was actually known to the Trustee Bank through two of its officers, who served as officers of Hein-Werner, and to Mrs. Hadcock whose husband had been a director of Hein-Werner.

The assertion that the Trustee ought to have selected the Hein-Werner stock, to fund the Trust for the A. W. Perkinses, overlooks the veto power (on which we shall comment shortly) which was given to Mrs. Hadcock under the trust agreement.

On the question of dual capacity, both appellant and the Trustee Bank cite *Ludington* v. *Patton* (1901) 111 Wisc. 208, as controlling in a situation of this nature.

In the *Ludington* case, executors and trustees under the will of Harrison Ludington, and their attorney, while negotiating with his widow for a contract to permit probate of Harrison Ludington's will, (to the advantage of the other beneficiaries under that will) not only failed to inform the widow of her right to elect the more generous provisions made for her by law, but also neglected to suggest the widow obtain information regarding her legal rights. Summary of the findings of fact made by the

Trial Court in that case includes the statement (at page 219):

> They did not wilfully misrepresent or misstate to her any matter to her prejudice, but they concealed the facts and the true nature of the plaintiff's rights *from her* when they should have communicated the same *to her* because of their relation *with her,* as executors of the will and trustees of the estate. [The Court's italics]

In the opinion of the Supreme Court of Wisconsin in *Ludington* (at page 239) quoted by appellant in his brief, the Court there said:

> • • • No rule is better established than that, if a trustee or a person standing in relations of trust and confidence to another deal with the *cestui que trust* or such other in respect to the subject of such trust, for his own benefit or that of others whom he represents, serving two persons at the same time, in form, when in contemplation of law he can serve but one loyally, the transaction cannot be upheld if called in question by the *cestui que trust* unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence, that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, that the bargain was profitable to the beneficiary, and that he was fully informed in regard to the value of the property and the nature of his interest in it. (citations omitted) The policy of the law is to regard all transactions of a contract nature, between a trustee and his *cestui que trust*, whereby the former obtains the interest of the latter, or some part thereof, in the subject of the trust, as presumptively fraudulent and void at the election of the latter. If such a transaction be per-

> mitted to stand it is upon condition that the trustee satisfies the court, fully and completely, that the *cestui que trust* received a full equivalent for that which he parted with, and that the transaction was to his advantage rather than to his disadvantage. The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts, and the same is true where a person deals to his own advantage with a person with whom he sustains relations of trust and confidence. • • •

In the case before us, the Trustee Bank clearly satisfied the District Court that the transaction was to the advantage rather than the disadvantage of the A. W. Perkinses as the income paid to them exceeded that which would have been secured had the Trustee Bank funded the trust with assets authorized by the Wisconsin statutes. We have reviewed the evidence and find no error in the District Court's findings on this point.

The collateral for Mrs. Hadcock's note consisted of promissory notes secured by real estate mortgages and ten U. S. Savings Bonds, all of which were assets of the Perkins estate, and which had a total value of $55,564.77. The notes secured by the real estate mortgages were not in the portfolio originally assigned to the Trustee Bank by Samper Perkins. It was the Trustee Bank's position that it was empowered to invest in such assets. The trust instrument was subsequently construed in *First Wisconsin Trust Co.* v. *Perkins and wife, et al.*, (1957) 275 Wisc. 464. The Trial Court had ruled that the trust instrument conferred broad powers with respect to investing the trust funds and that the Trustee was not required to comply

with the Wisconsin statutory limitations on trust investments. On appeal, however, the Wisconsin Supreme Court held that the Trustee was authorized to hold the assets originally assigned to it whether or not those assets conformed to the Wisconsin limitations for investment of trust funds, but that the Trustee had not been empowered to make discretionary investments beyond the limitations of the Wisconsin statutes.

Appellant argues that investment in Mrs. Hadcock's note constituted a failure to comply with the applicable statute. In appellant's view the collateral for the note also fell short of the statutory requirements. The applicable statute, Wisconsin Statutes, 1939, Sec. 320.01 insofar as here pertinent, permitted investment in indebtednesses of the United States, in certain first lien real estate mortgages, or in promissory notes secured by pledge of bonds, or real estate mortgages in which investment was authorized. Section 320.02 provided a limitation as follows:

> The proportion of any one trust fund that may be invested by * * * trustee in notes * * * the value of which is dependent upon the same persons * * * shall be subject to limitations as follows:
>
> * * * * * * * * * * *
>
> (3) When it exceeds twenty thousand but does not exceed fifty thousand dollars, thirty per cent thereof; * * *

Appellant contends that the maximum 30% limitation was here exceeded. A $23,000 mortgage note signed by John Nicholas Weber and Evelyn Weber was included in the collateral. Thus, appellant asserts, the statutory limit was exceeded. The Trustee Bank replies that the total col-

lateral exceeded the requisite $50,000 by $5,564.77; hence only $17,435.23 of the Weber mortgage was required for compliance with the statute. The mortgage note was signed by two persons, not only one, and, thus, the Trustee asserts, the limitation does not apply.

The District Court found that the Trustee and Mrs. Hadcock intended to comply with the statutes and that the investment was made in good faith.

In any event, it is undisputed that since May 15, 1943, the collateral notes of Mrs. Hadcock (and later of her executor) were secured by Government Bonds of the stated value of $50,000.

Even if there had been a three-year failure to comply with the statute by partial investment in unauthorized securities, there is no showing of damage to the A. W. Perkinses. In the event of any such breach of trust, the remedy is to require the Trustee to turn over, to the trust, the amount of such trust fund which has been placed in investments not permitted by statute, with interest at such rate as the Court finds trust funds invested in prescribed securities would have yielded under the circumstances. *In re Guardianship of Uggen* v. *Amble*, (1937) 224 Wisc. 24, 29. In the absence of loss there can be no recovery of damages. *U. S. Fidelity & G. Co.* v. *Pullen*, (1939) 230 Wisc. 137, 143; *In re Guardianship of Farness* v. *Central Wisc. Trust Co.*, (1937) 225 Wisc. 383, 388, where the Court said:

> The mere fact that the guardian failed to • • • invest • • • in securities specified in sec. 231.32, Stats., does not render the guardian liable for damages in the absence of proof that the [redacted] sustained some loss.

The evidence in this case fully supports the District Court's finding that:

> 19. The reinvestments by trustee exceeded the average yield on legal investments, and the plaintiff suffered no loss or damage as a result of the making of said reinvestments.

Appellant argues that substitution of Government Bonds in 1943 did not rectify the alleged violation of the trust three years earlier, relying on *Oliver* v. *Piatt*, (1845) 44 U. S. 333, 11 L. ed. 622. There the trustee misappropriated trust assets and invested them in other property. The original assets were later repurchased for return to the trust. The beneficiary elected to trace the new more valuable property and was allowed to do so. The Court in *Oliver* said:

> The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a repurchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the meantime, to the account of the *cestui que trust*—whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested) exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. • • •

The Trustee Bank received no such profits as were misappropriated in *Oliver*. Appellant's view, however, is that

the Trustee Bank, in its capacity as Mrs. Hadcock's financial agent, did physically receive the earnings of the Hein-Werner stock, and then diverted such earnings to Mrs. Hadcock instead of distributing them to the A. W. Perkinses. We cannot agree. The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.

In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent.

From June 25, 1940, until its resignation May 17, 1955, when it was succeeded by the First Wisconsin Trust Company, as successor-trustee, the Trustee Bank paid the A. W. Perkinses $200 per month, retaining $100 per year as its fee. The First Wisconsin Trust Company received the full $50,000 in principal. It is stipulated that the average annual yield on legal trust fund investments during the period from August 3, 1937, to May 17, 1955, has not exceeded a 5% return.

On September 16, 1950, Mrs. Hadcock died. When the complaint herein was filed, Mrs. Hadcock's estate was in probate. Defendant-appellee, Edward G. Bach, is her executor, a trustee under her will and the transferee of the Hein-Werner stock which appellant seeks to restore to the trust.

The evidence supports the following findings of the District Court:

> 16. The reinvestments by the trustee were made with the approval and consent of Isabel Hadcock as required by the terms of the trust agreement.
>
> 17. The trustee received no benefit either directly or indirectly from the reinvestments in question.
>
> 18. The agency agreement between the bank and Mrs. Hadcock did not constitute a fraud against the plaintiff.

We have carefully considered all other arguments advanced by appellant and find them to be without merit.

The judgment of the District Court is AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago 10, Illinois

Friday, May 26, 1961
Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 13210

A. Ronald Perkins, Administrator of the Estate of Sue Garrett Perkins, Deceased,
Plaintiff-Appellant,
vs.
Waukesha National Bank, Individually, and as Trustee, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs, in accordance with the opinion of this Court filed this day.

Appendix B

TYPICAL CASES APPLYING EQUITABLE RULE OF ELECTION IRRESPECTIVE OF PROOF OF DAMAGES

Case	Citation	Particular violation of trust	Relief sought by Beneficiary	Relief granted	Did beneficiary receive an amount equal to or more than minimum which trust provided?	Rationale
Perkins (trust here in suit)	290 F. 2d 912	Trustee exchanged trust assets earning substantially in excess of 5% for improper trust investment earning only 5%	Restoration of income earned by exchanged assets	None	Yes—life beneficiaries received more income than "legals" provided, but less income than the exchanged assets returned	Beneficiaries not entitled to elect a restoration of assets because they were considered not to have been damaged by the breach of trust. The improper investment earned more than one of the two available investment choices would have returned
Will of Gabel (1954)	267 Wis. 208, 64 N.W. 2d 853	Trustee, contrary practices followed *before* settlor's death, retained part of trust income for his own benefit and purchased his own assets as trust investments	Removal of trustee and accounting for retained income	Trustee removed and accounting decreed	Yes—court found no loss to the trust, trust estate derived same or greater income than it had before death of settlor following same retention practices; and safety of some investments increased	Beneficiary entitled to affirm transactions and to compel restoration to the trust of income retained by trustee
Old Settlers Club v. Hann (1944)	245 Wis. 213, 13 N.W. 2d 913	Trustee used trust funds to buy and sell stock upon which trustee realized commissions and profits	Recovery of profits made by trustee	Recovery of profits ordered	Yes—beneficiary received full interest on investments made; and no loss in principal	Beneficiary entitled to affirm transactions and to compel restoration to trust of profits made by trustee
United States v. Dunn[1] (1925)	268 U.S. 121	Trustee granted an oil and gas lease in violation of his trust to grantees with notice	Beneficiary sought to cancel lease or in alternative to recover corporate stock for which it had been exchanged by the grantees	Assignee of lease was bona fide purchaser so beneficiary awarded the corporate stock held by grantees	Yes—lease was granted for an adequate price	Beneficiary entitled either to disaffirm the improper lease unless right cut off by bona fide purchaser or to affirm lease and recover proceeds received for it
Ludington v. Patton (1901)	111 Wis. 208, 86 N.W. 571	Trustee and heirs obtained agreement of widow to release her dower rights in estate in exchange for larger income and cash sum than provided in testamentary trust	Rescission of agreement and restoration of estate assets	Restoration of estate assets in specie and of income which widow would have had under dower election	Yes—widow received larger life income and cash sum than provided in testamentary trust	Widow entitled to elect a restoration of the estate assets against which she was permitted to exercise her dower rights
O'Dell and others	44 Wis. 136	Executrix and	Beneficiary	Property	Yes—no loss to estate since fair	Beneficiary entitled either to

		investments				
Old Settlers Club v. Hann (1944)	245 Wis. 213, 13 N.W. 2d 913	Trustee used trust funds to buy and sell stock upon which trustee realized commissions and profits	Recovery of profits made by trustee	Recovery of profits ordered	Yes—beneficiary received full interest on investments made; and no loss in principal	Beneficiary entitled to affirm transactions and to compel restoration to trust of profits made by trustee
United States v. Dunn[1] (1925)	268 U.S. 121	Trustee granted an oil and gas lease in violation of his trust to grantees with notice	Beneficiary sought to cancel lease or in alternative to recover corporate stock for which it had been exchanged by the grantees	Assignee of lease was bona fide purchaser so beneficiary awarded the corporate stock held by grantees	Yes—lease was granted for an adequate price	Beneficiary entitled either to disaffirm the improper lease unless right cut off by bona fide purchaser or to affirm lease and recover proceeds received for it
Ludington v. Patton (1901)	111 Wis. 208, 86 N.W. 571	Trustee and heirs obtained agreement of widow to release her dower rights in estate in exchange for larger income and cash sum than provided in testamentary trust	Rescission of agreement and restoration of estate assets	Restoration of estate assets in specie and of income which widow would have had under dower election	Yes—widow received larger life income and cash sum than provided in testamentary trust	Widow entitled to elect a restoration of the estate assets against which she was permitted to exercise her dower rights
O'Dell and others v. Rogers and others (1878)	44 Wis. 136	Executrix and another fiduciary purchased asset from estate	Beneficiary disaffirmed sale and demanded restoration of property sold	Property ordered restored to beneficiary	Yes—no loss to estate since fair purchase price paid by the fiduciaries	Beneficiary entitled either to affirm or disaffirm the improper purchase
Cook v. Berlin Woolen Mills (1877)	43 Wis. 433	Corporation manager [trustee] purchased corporate plant and realty for his own benefit	Corporation disaffirmed the sale and sought restoration for its own benefit	Property restored to the corporation	Yes—manager paid a fair and adequate price for the property	Beneficiary entitled either to affirm or disaffirm the improper purchase
Oliver v. Piatt[2] (1845)	3 How. (44 U.S.) 333	Trustee exchanged trust assets for other property and later repurchased original assets for the trust	Beneficiaries affirmed the exchange and demanded that the other property be placed in trust rather than the original assets	The other property was placed in trust	Yes—the original trust assets were reacquired by trustee and returned to the trust	Beneficiaries entitled to an option either to affirm or to disaffirm the improper exchange of trust assets

[1] *United States v. Dunn* is exemplary of subsequent application of the rule of election announced in *Oliver v. Piatt*.

[2] *Oliver v. Piatt* states the common law applicable in Wisconsin [Wisconsin Constitution, Article 14, Section 13] and was relied upon in *Harrigan v. Gilchrist* (1904) 121 Wis. 127, 99 N.W. 909.

SUPREME COURT, U. S.

FILED

OCT 30 1961

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1961

No. 451

A. RONALD PERKINS, Administrator of the Estate of SUE GARRETT PERKINS, Deceased,

Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of ISABEL HADCOCK, Deceased, and as Trustee under the Last Will and Testament of ISABEL HADCOCK, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1961

No. .....

A. RONALD PERKINS, Administrator of the Estate of SUE GARRETT PERKINS, Deceased,
Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of ISABEL HADCOCK, Deceased, and as Trustee under the Last Will and Testament of ISABEL HADCOCK, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

It would be difficult to find a case less worthy of the attention of this court than the one here presented.

The real question decided below is one of fact rather than law. The district court so dealt with the case in stating:

"The claim for relief herein is based on the manner in which this fund was invested at the time it was segregated on June 25, 1940."

The Circuit Court of Appeals affirmed the following findings of the District Court:

"13. That it was the intention of the Trustee in reinvesting in the $50,000 secured note of Mrs. Isabel Hadcock on June 25, 1940, to comply with Chapter 320 of the Wisconsin Statutes, and it was the intention of Mrs. Isabel Hadcock to furnish the trustee with security, which was legal for the investment of trust funds under Chapter 320 of the Wisconsin Statutes.

"14. The reinvestment by the trustee in the $50,000 note secured by government bonds on May 15, 1943 and thereafter complied with the requirements of Chapter 320 of the Wisconsin Statutes.

"15. The reinvestments by the trustee were not made in bad faith.

"16. The reinvestments by the trustee were made with the approval and consent of Isabel Hadcock as required by the terms of the trust agreement.

"17. The trustee received no benefit either directly or indirectly from the reinvestments in question.

"18. The agency agreement between the bank and Mrs. Hadcock did not constitute a fraud against the plaintiff.

"19. The reinvestments by trustee exceeded the average yield on legal investments, and the plaintiff suffered no loss or damage as a result of the making of said reinvestments."

Petitioner does not contend in his brief that the findings are unsupported by the evidence. Without alluding to the evidence, he assumes the very fact in issue—*that trust assets which should have been placed in trust for the benefit of the original plaintiffs were exchanged for improper trust fund investments.* (Pet. p. 17)

There is not a scintilla of evidence in the record that any exchange of assets took place. The plain fact is that by the terms of the trust instrument any investment by the trustee could properly be made only after receiving Mrs. Hadcock's consent to such investment. (App. p. 62) The trial court found that she had never given her consent to an investment in Hein-Werner Corporation common stock. (App. p. 46)

Petitioner from the very outset has misconceived his rights in this litigation. The Supreme Court of Wisconsin, in construing the *inter-vivos* trust agreement in question, held that in the making of any new investment the trustee was bound to heed the legal trust fund investment statute. (See *First Wisconsin Trust Company v. Perkins* (1957), 275 Wis. 464, 82 N. W. 2d 331 and App. p. 46.) The Wisconsin Supreme Court did not hold that the trustee was obligated to retain the donor's original investments, i.e., Hein-Werner Corporation common stock, yet it is on this premise that petitioner has based the whole theory of this case.

The circuit court of appeals properly rejected the suggestion of counsel that the trustee was obligated to invest in Hein-Werner Corporation common stock. The circuit court of appeals stated:

"The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.

"In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent."

Appendix A to Pet., p. xi

The plain fact is that the trustee made a new investment in Mrs. Hadcock's promissory note secured by legals or at least so intended. (App. p. 47) Hence, under the Wisconsin Supreme Court decisions the beneficiaries of this trust became entitled to a return on a legal trust fund investment. Everyone has agreed that such an investment has never exceeded five per cent. The district court on competent evidence found:

"The trustee made what it believed was a legal investment, and *it is undisputed that the investment so made exceeded the average yield on legal investments.*"

App. pp. 41-2

It is undisputed that there has never been any depreciation of the trust principal, nor have the beneficiaries

suffered a penny's loss of income from the actual investments made by the trustee.

We have found no case nor has petitioner throughout these proceedings cited us to one holding that a trustee of a legal trust fund investment is guilty of fraud who invests in assets which yield more than legals and who pays all of the income so received to the life income beneficiaries.

Conversely, there are several Wisconsin cases which hold that the mere fact that a trustee fails to invest in securities which qualify under the legal trust investment statute does not render the trustee liable in the absence of proof that the beneficiaries sustained some loss.

> *Guardianship of Farness*, 225 Wis. 383, 273 N. W. 522;
>
> *Estate of George*, 225 Wis. 251, 270 N. W. 538;
>
> *U. S. Fidelity & G. Co. v. Pullen*, 230 Wis. 137, 283 N. W. 462.

See also *Restatement of the Law of Trusts*, Secs. 209-210, pp. 575-577.

In this case the beneficiaries have sustained no loss, either of income or of principal. They attempt to leave the impression in the petition to this Court that the district court found that the Isabel Hadcock note was never secured by legal trust fund investments. (Pet. p. 7) The district court never passed upon the question. (App. p. 39) Whether or not it was so invested became immaterial in the absence of a showing of loss or damage to the beneficiaries of the trust.

It comes as no surprise that petitioner should make extravagant claims in this litigation much the same as was done by these same beneficiaries in an earlier case. (See *Perkins v. Bach*, 350 U. S. 918, 78 S. Ct. 206, 233 F. 2d 251.) But in so doing, petitioner should bear in mind that if the donor intended that these beneficiaries should have the benefit of the yield on Hein-Werner Corporation common stock or on any other specific investment, it was for him to so state in the trust agreement. This the donor did not do.

I

The Trustee Was Bound to Respect the Wishes of Isabel Hadcock in Setting Up the $50,000 Trust.

The Trust Agreement provided in part as follows:

> "10. In making distributions of the Principal of said trust estate, or setting aside any portion of such trust estate as hereinafter directed, the trustee may, in its discretion, appraise and distribute specifically any and all of the securities in which the trust estate shall be invested, or may sell or otherwise convert the same into money, or other securities, and may make such just and equitable distribution and division as in its discretion shall do justice between the parties; this power, however, to be exercised only with the approval and consent of my sister, Mrs. Belle Hadcock, during her lifetime."

If under the terms of the trust agreement a remainderman has power to control the action of the trustee in determining whether the trust should be set up by retaining assets of the settlor or by investing in legal investments, it

is well settled that the trustee is under a duty to act in accordance with the exercise of such power. See *Restatement of Trusts,* Vol. I, sec. 185, page 470.

No Wisconsin Supreme Court case is cited by petitioner that the foregoing is not a correct statement of the law of Wisconsin. No facts were proved at the trial which would require the court to find that Mrs. Hadcock was under a duty to select Hein-Werner Corporation common stock to fund the trust.

Moreover, if the trustee had wanted to set aside Hein-Werner Corporation common stock to fund the trust, Mrs. Hadcock had the power of veto over such selection. But petitioner's intestates have never requested the trustee to make such an investment; nor does the record show that such an investment was ever contemplated prior to the commencement of this action, either by the trustee, the beneficiaries or by Mrs. Hadcock.

No case has been made in the present record which could support a finding that Mrs. Hadcock was estopped from exercising her right of veto, or that she waived such right.

Petitioner's failure to mention in the petition the above quoted clause of the Trust Agreement suggests that it is not readily susceptible to attack.

II.

Petitioner Failed to Prove that the Trustee Exceeded its Investment Powers.

By the terms of the Trust Agreement, Mrs. Hadcock, when the $50,000 trust had been set aside, was entitled to receive the residue of principal and income of the trust fund. (App. p. 64)

Since the residue included as one of its assets the Hein-Werner Corporation common stock, Mrs. Hadcock received the stock and rightfully so.

The only quarrel which petitioner has with the trustee or Mrs. Hadcock is that the $50,000 trust was funded by Mrs. Hadcock's $50,000 collateral note secured by the pledge of assets described in Exhibit 5. (See App. pp. 69-71.) There is no evidence that the collateral described in Exhibit 5 did not meet the legal trust fund requirements of Chapter 320, Wisconsin Statutes. The total collateral requirement was in fact exceeded by $5,564.77.

Contrary to appellant's statements in his petition, neither the district court nor the court of appeals found that the trustee exceeded its limited investment powers (Pet. p. 10), or that the terms of the trust were violated by "exchanging proper trust assets for a reinvestment unauthorized by Wisconsin statute." (Pet. p. 11) The suggestion that there is any basis for such finding is a wholly gratuitous assumption unsupported by a shred of evidence. Again we emphasize that throughout his petition and his brief in the court below, petitioner *assumes* and takes for granted the very facts in issue in the litigation, namely,

that the trustee exceeded his investment powers and the trustee exchanged a proper trust fund investment for an improper one.

We look in vain for any evidence which even remotely tends to prove petitioner's position on these factual issues.

III.

The Transaction of Which Petitioner Complains Was to the Advantage of the Life Income Beneficiaries.

Petitioner has argued throughout these proceedings that the Trustee was not impartial toward the life income beneficiaries because it served in a dual capacity, i.e. as trustee of the trust and as financial agent of Mrs. Hadcock.

It is, of course, undisputed that the trustee received no benefit of any kind from the allegedly wrongful transaction whereby it invested in Mrs. Hadcock's collateral note.

And it is equally clear from the record that Mrs. Hadcock paid as much interest to the trustee as the trustee could have obtained by investing in legal trust fund investments. (It was stipulated by petitioner that the average yield on investments eligible for trust funds under Chapter 320 of the Wisconsin Statutes during the period August 3, 1937 to the date of trial has not exceeded a 5% return.) (See Stipulation of Facts, paragraph X, App. p. 58.) Mrs. Hadcock continuously paid 5% annual interest to the trustee.)

Accordingly, the Circuit Court of Appeals, after reviewing the Wisconsin Supreme Court cases and the facts in evidence, stated as follows:

> "In the case before us, the Trustee Bank clearly satisfied the District Court that the transaction was to the advantage rather than the disadvantage of the A. W. Perkinses as the income paid to them exceeded that which would have been secured had the Trustee Bank funded the trust with assets authorized by the Wisconsin statutes. We have reviewed the evidence and find no error in the District Court's findings on this point."
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> App. A, p. x

Petitioner has cited no Wisconsin case in point which permits recovery under the facts of this case, i.e., where the investment made is to the advantage rather than the disadvantage of the income beneficiaries and where neither the trustee nor the remainderman have made a penny of profit from the transaction.

IV.

Even if the Obligation to Invest in Legals Had Been Breached, There can be no Recovery in the Absence of a Showing of Damage.

At the time of setting aside the trust fund of $50,000, the trustee did not intend to breach the trust agreement, and as a matter of fact, did not commit a breach of trust involving bad faith. The only breach of trust which can be claimed was a violation of the "proportion" statute, Sec. 320.02, Wis. Stats., for the brief period from June 25, 1940, until May 15, 1943, during which period there was neither loss of income nor depreciation of principal. The alternative remedies which the beneficaries may pursue during that period are as follows:

(1) Either have the trustee account for the trust principal and the income actually received and have the trustee add the money so accounted for to the trust, or

(2) Hold the trustee liable for any deficiency in principal and income as compared with the situation in which the trust would have been had the trustee invested in legals.

In this instance the trustee has accounted for the trust principal and for the income actually received.

Furthermore, there has been no deficiency in principal or income as compared with the situation in which the trust would have been had the trustee invested in legals.

This rule has been applied in Wisconsin where the trustee failed to invest in legals, as follows:

> "The guardian's placing of his ward's funds in the bank on certificates of deposit must be considered as an investment; and he must be held to have breached his duty in not investing them in such securities as the statute required; and he must be required to turn over to the administrator of his ward's estate in cash the amount of the trust certificate *with interest thereon at such rate as the county court shall find trust funds invested in securities such as are prescribed by the statute available under the circumstances would have yielded.*" (Emphasis supplied.) *Guardianship of Uggen,* 224 Wis. 24, 271 N. W. 326.

The corollary to the foregoing rule has been uniformly applied in Wisconsin by its holdings that where the requirement that the trustee invest in legals has been breached, there can be no recovery unless damage is proved.

In *United States F. & G. Co. v. Pullen*, 230 Wis. 137, 142, 143, 283 N. W. 462, a trustee breached the trust by investing in "non-legals." In sustaining the lower court the Supreme Court held:

> "In arriving at those conclusions the court relied upon the rulings of *Guardianship of Farness*, 225 Wis. 383, 273 N. W. 522, and *Estate of George*, 225 Wis. 251, 270 N. W. 538, 274 N. W. 294, to the effect that the mere fact that a fiduciary failed to convert securities into cash and to invest the proceeds in securities specified in sec. 231.32, Stats., does not render him liable for damages in *absence of proof that the trust estate sustained some loss during the period of the fiduciary's administration.*" (Emphasis supplied.)

In *Guardianship of Farness*, 225 Wis. 383, 387, 273 N. W. 522, the court applied the same rule, stating:

> "There is no finding, nor is there any evidence to sustain a finding, that the stock was not worth as much at the time it was tendered to the respondent as it could have been sold for at any time during the period when the guardian should have converted it. It requires no citation of authorities to the proposition that if the ward sustained any loss by reason of any breach of duty on the part of the guardian, the burden of proof to establish such loss was upon the ward.
>
> "The mere fact that the guardian failed to convert the stock into cash and invest the proceeds in securities specified in sec. 231.32, Stats., does not render the guardian liable for damages in the absence of proof that the ward sustained some loss. This she failed to do."

Petitioner does not recognize the equitable remedy which governs this case. In his play for high stakes, he

asks this court to require the trustee to account for profits which it has never made and would only have been made if the trustee had invested in Hein-Werner Corporation stock, an investment which not only required the exercise of discretionary power by the trustee, but the consent of Mrs. Hadcock. The rules do not permit the court to substitute its judgment for that of the trustee.

> "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." *Restatement of the Law of Trusts*, Vol. 1, sec. 187.

Plaintiff seeks to gain advantage by punishing the trustee and Mrs. Hadcock because they did not have the foresight which can now be gained by the application of hindsight. The objective of a proceeding in a court of equity is not punitive.

> "The object of award of damages is not to penalize or punish the defendant for a reprehensible act, but to make the plaintiff whole. The cestui should recover only those damages which flow with reasonable certainty from the trustees' breach." *Bogert on Trusts*, Second Ed. (1960), sec. 703, p. 435.

Conclusion

We close by commenting upon the extravagant statements of counsel in his reason No. 2 for granting certiorari.

He states:

> "What the life tenants 'parted with' here was *income from assets earning 'substantially in excess of 5% income,'* (App. 55) and what they 'received' was 5% annual income on $50,000."
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> (Pet. p. 19)

In reply to this statement we quote the following language from the Circuit Court of Appeals opinion:

> "Appellant's view, however, is that the Trustee Bank, in its capacity as Mrs. Hadcock's financial agent, did physically receive the earnings of the Hein-Werner stock, and then diverted such earnings to Mrs. Hadcock instead of distributing them to the A. W. Perkinses. We cannot agree. The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.
>
> "In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the

assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent."

(Pet. p. xiii-xiv)

Thus it is apparent that petitioner seeks to invoke the jurisdiction of this Court by castigating an opinion which holds squarely in accordance with the rule of the Wisconsin Supreme Court cases cited above that even in the event of breach of trust, the remedy is to require the trustee to turn over the amount which has been placed in investments not permitted by statute with interest at such rate as the trust fund invested in prescribed securities would have yielded.

The trustee has already accounted for principal and income in accordance with the foregoing rule.

The decision of the Court of Appeals is thus clearly in accord with the controlling Wisconsin law. No useful purpose can be accomplished by a further review.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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